Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-385

JOHN MCCARTHY,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

CARL E. RING
*Attorney for Petitioner John McCarthy*
1701 Palisade Avenue
Union City, N.J. 07087
(202) 865-7222

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John McCarthy, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered July 23, 1979, in *United States* v. *Gallagher et als.*, which vacated an order of the United States District Court of New Jersey dismissing an indictment and remanding for a new trial.

### Opinions

The opinion on the Judgment of the Court of Appeals sought to be reviewed, dated July 23, 1979, is unreported and is printed herein.

Two memorandum opinions of Judge Biunno, one on dismissing the indictment December 8, 1978, and one on reconsideration January 30, 1979 are unreported but are printed herein.

The opinion of the Court of Appeals on reversing the convictions on the first appeal and remanding to the District Court without an order for a new trial is reported in 576 F2d 1028 (1978).

## Jurisdiction

The judgment sought to be reversed is dated and was entered July 23, 1979.

A petition for rehearing was timely filed August 6, 1979 and denied without opinion, August 17, 1979.

An order was signed by Mr. Justice Brennan, August 9, 1979 extending the time to file this petition from August 22, 1979 to September 21, 1979.

This Court has jurisdiction under 28 USC Sec. 1254 (1).

## Questions Presented

The Court of Appeals held the Appeal, was permissible under 18 USC Sec. 3731 citing *Serfass* v. *United States,* 420 US 377 (1975), in which there was no question of Double Jeopardy.

(1) Was the Appeal barred by 18 USC Sec. 3731 when the indictment was dismissed after Jeopardy attached by the first trial?

(2) Was the indictment defective when not a single substantive count charged the defendant's criminal knowledge that the Court of Appeals held must be proved?

## Constitutional Provision and Statutes Involved

This Petition involves:

(1) The due process of Law and the Double Jeopardy Clauses of the Fifth Amendment.



(2) In criminal cases the right to be informed of the nature and cause of the accusations of the Sixth Amendment.

(3) 18 USC Sec. 3731, Sec. 656, Sec. 371, 28 USC Sec. 2106.

## Statement of the Case

The defendant, Fredenburgh was an officer of the Commercial Trust Co. of New Jersey at Bayonne, N.J. The defendant, Gallagher, was owner and operator of Bar Mar Trucking Company. The defendant, McCarthy was an office employee of the Bar Mar Company.

Gallagher was unable to borrow money for his business and he solicited and prevailed upon several individuals to take out loans from the bank and turn the money over to Gallagher. Gallagher promised the borrowers that he would repay the loans and Fredenburgh knew that the loans were taken out for the benefit of Gallagher. Gallagher asked defendant McCarthy to ask Deborah Dominach, an employee in his office to take out a loan and said Gallagher would repay it. She took out a loan of $5,000.00 and Gallagher received the money.

Each defendant was tried on one count of conspiracy Sec. 371, to violate Secs. 1014 and 656, two counts on which all three defendants were charged with violating Sec. 1014, and twelve counts in which all three defendants were charged with violating Sec. 656, each in reference to a different loan. (The indictment is printed in full 576 F2d 1046.)

All counts of the indictment included all the allegations of the conspiracy, necessary with respect to Sec. 656 because Gallagher and McCarthy were not bankers and could only be convicted by way of conspiracy if Fredenburgh the banker was convicted.

In addition, Fredenburgh was charged alone on one count of violation of Sec. 656 in connection with a single loan. Fredenburgh was convicted on all 16 counts and Gallagher on all 15 counts.

McCarthy was convicted on one count of violating Sec. 656 (the Deborah Dominach loan, Count VII) and one count of conspiracy, Count I, and was acquitted on all other counts.

All three defendants were convicted on one count of conspiracy, Sec. 371.

On appeal, the conviction of Fredenburgh on two counts of violation of Sec. 1014 was affirmed and the conviction of Gallagher on those two counts was reversed for insufficient evidence. McCarthy had been acquitted on those two counts. All other convictions of Sec. 656 and the Conspiracy Sec. 371 were reversed, because the Court failed to charge that the "jury must find that Fredenburgh the banker knew that those named as debtors lacked the ability or intent to repay the said loans" (576 F2d 1046).

The case was remanded to the District Court, but the Court of Appeals did not order a new trial.

After remand, a number of Motions were filed including a Motion to Dismiss (p. 2a). At a hearing, September 12, 1978, the Court expressed the opinion that a new trial would be as long or longer than the first trial which lasted several weeks and that the evidence would probably be the same because all the witnesses had been thoroughly examined and cross examined and that there was no evidence in the record of Fredenburgh's knowledge of the borrowers' lack of ability to repay (p. 3a).

Both sides requested the instruction that the jury must find that Fredenburgh knew that the borrower lacked the ability to repay (576 F2d p. 1046 footnote).



The Court declined to give the instructions because there was insufficient evidence in the record (p. 8a). The Court asked the attorneys to review the records for such evidence and set dates and asked for briefs. The Prosecutor at that hearing said (transcript page 17) "I think all we need do here to retry the case on the same facts and give them that charge and we have done what the Court wanted."

After fifteen weeks during which no attorney responded, and the Prosecutor definitely refused to review the record and made no offer or suggestion of additional evidence, the District Court reviewed the record and determined for the second time that the evidence in the record was that Fredenburgh knew nothing about the ability of the borrowers to repay, and that not a single substantive count of the indictment charged that Fredenburgh had such knowledge.

The Court then dismissed the indictment for insufficiency of evidence and because the indictment was defective.

The Court of Appeals said (p. 21a) "we are therefore in some doubt as to whether the Court acted on the legal questions of the indictment language or whether it in effect was ruling that the anticipated evidence on retrial would be insufficient for conviction."

Judge Biunno wrote two very clear opinions both printed herein showing that the indictment was dismissed for both reasons either of which is sufficient to sustain the dismissal.

The Court of Appeals analyzed the indictment and held it valid on its face (p. 22a).

The Court of Appeals did not challenge the insufficiency of the evidence to prove Fredenburgh's knowledge but held "if the District Court's determination to dismiss the indictment was based on its reassessment of the sufficiency of the evidence that action was beyond the scope of its authority" (p. 24a).

The Court of Appeals pointed out that it was not until after the indictment was dismissed that the Government chose to abstract the trial record and furnish the District Judge with the culled extraction of testimony which he unsuccessfully sought months earlier (p. 20a).

The Court of Appeals suggested that if the evidence was originally made available to the Court, it might have affected the Court's order and avoided an unnecssary Appeal (p. 20a).

The Court of Appeals in denying the authority of the Court to assess the evidence, contradicts itself because, it severly reprimanded the Prosecutor for refusing to assist the Court when it sought help in analyzing the problem (p. 20a).

The Court of Appeals found no Double Jeopardy and vacated the order dismissing the indictment and remanded for a trial forthwith.

## Reason for Granting the Writ

The Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court and has decided Federal questions in a way not in accordance with applicable decisions of this Court.

## Argument

The petitioner contends that the Appeal in the Circuit Court of Appeals was barred under 18 USC 3731 because the Double Jeopardy Clause of the United States Constitution prohibits further prosecution.

The convictions were reversed for errors in the charge. Double Jeopardy is not a defense to a second trial if the convictions were reversed for error in the charge. The petitioner contends however that the Double Jeopardy



Clause prohibits further prosecution and bars an Appeal from the dismissal of the indictment for several separate interpretations of the Double Jeopardy Clause in the subsequent proceedings.

## No Order for Retrial

The opinion on the first appeal which reversed the convictions simply remanded to the District Court and did not order a new trial. There can be no trial of any kind in the Federal Court without legislative and judicial authority.

Indictment, jurisdiction in the District Court, and jury trial for the first trial are provided by the Constitution and Act of Congress. The jurisdiction of the District Court was terminated when a Notice of Appeal was filed. The Court of Appeals has only such power and jurisdiction as provided by Congress. 28 USC 2106 provides that the Court of Appeals can reverse a conviction, and also that that Court may order or require such further proceedings to be had "as may be just under the circumstances". This Court has held that to be Congressional authority to order a new trial.

The Government must be as alert to protect its right to a new trial by making timely demand and obtaining an order for such, as the defendant must be alert to protect its right to an Appeal by filing a timely Notice of Appeal. Failure to act in one case is as fatal as the other.

The decision of this Court that Double Jeopardy is not a defense to a new trial after the reversal of a conviction if the reversal is for judicial error in the charge does not create the right to a new trial. It is a judicial interpretation of the negative effect of the Double Jeopardy Clause. It simply bars a defense to a prosecution but the prosecution, must have a legislative authority.

To hold that such a decision creates the right to a new trial is like lifting one's self by the boot straps. This Court is not called upon to rule on the question of Double Jeopardy unless and until a proceeding is in progress and the defense is raised.

The Court of Appeals must be impartial. It is not the Prosecutor and cannot and should not order a new trial unless and until requested by the Government and is justified.

Without an order for a new trial there is no legislative authorization and a second trial would be a deprivation of liberty without due process of law and putting the defendant twice in jeopardy for the same offense in violation of the fifth amendment.

## Insufficient Evidence

Judge Biunno, having refused to give the charge at the trial because there was no evidence to support it, was propery concerned with whether or not there would be sufficient evidence to prove Fredenburgh's knowledge on retrial before starting a retrail of several weeks.

The Prosecutor indicated he would retry the case on the same facts and made no suggestion or offer of additional evidence. The District Court then asked all the attorneys to review the record to determine and advise the Court if there was any evidence in the record on Fredenburgh's knowledge.

The Prosecutor definitely refused to review the record (p. 20a) for that purpose and took the position that the Court of Appeals had found the evidence sufficient and that was the law of the case. The Court of Appeals had examined the evidence with respect to each loan and held that without employing inference or inferences, the evidence was sufficient to prove the intent and effectuation of



the plan to violate Sec. 371 and Sec. 656 (576 F2d 1037). This must be construed to mean sufficient evidence to sustain the convictions of Sec. 371 and Sec. 656 on the charge as given to the jury by the District Court. Later on in the opinion, the Court reversed all the convictions of Sec. 371 and Sec. 656 because the District Court did not charge that the jury must find that Fredenburgh, the banker, knew that the borrowers lacked the ability to repay the loans (576 F2d 1046).

There were twelve loans by different people and it would require an investigation into each to determine the ability of each borrower to repay and whether or not Fredenburgh had such knowledge in each case. The Court of Appeals did not have that issue before it and did not purport to rule on the sufficiency of the evidence of Fredenburgh's knowledge. In fact, the Court indicated lack of such knowledge because it said (576 F2d 1033):

> "Those borrowers whom Gallagher sent to the bank to take out loans with Fredenburgh, were not questioned by Fredenburgh respecting their ability to repay or the terms of the loan."

Judge Biunno's finding after reviewing the record, the Prosecutor having neither suggested nor offered any additional evidence (p. 5a), that on retrial there would be insufficient evidence to prove knowledge by Fredenburgh that the borrowers lacked the ability to repay, was judicially sound.

A jury has no function unless and until the Court finds sufficient evidence to submit the case to the jury for its decision. There was therefore no legal requirement or purpose to swear in a jury and continue the trial to take the evidence again for weeks. The dismissal was proper and violated no rule of law or procedure or decision of this Court.

This Court is sensitive to the great waste of time and money and the burden on the judicial system by undesirable lengthy jury trials.

The Court of Appeals did not reverse that finding, but held that the District Court was acting beyond the scope of its authority in assessing the evidence and finding it insufficient.

The Court of Appeals relied on cases holding that the District Court cannot on a pretrial motion before a first trial assess the evidence and dismiss the indictment. The petitioner concedes that rule but contends that the reasons for it do not exist on a retrial and the circumstances are entirely different and Double Jeopardy becomes an issue. Furthermore, the Court and both parties had heard all the testimony when taken under oath with thorough cross examination.

The Court of Appeals held that such different rule is premised on the Prosecutor being limited to the evidence of the first trial. It was the Prosecutor who limited himself to the evidence on the first trial by his law of the case theory. Neither the District Court nor the petitioner suggested any such limitation. In fact, the main purpose of the September 12, 1978 hearing was to find additional evidence if available.

The District Court had refused that charge at the trial because there was no evidence to support it. The District Court then at the September 12, 1978 hearing before beginning a long trial, reopened the question and gave the Prosecutor a chance to supply any additional evidence or show the Court that such evidence existed in the Record. The Prosecutor rejected the offer and refused to aid the Court for which he was reprimanded by the Court of Appeals. The District Court wanted to avoid swearing in a jury and starting a trial of several weeks only to end with an order of acquittal for insufficient evidence. The result was the dismissal.



The Court of Appeals quoted *Burks* v. *United States,* 437 US 1 (1978), to the effect that the Double Jeopardy Clause bars a second trial to supply evidence that the Prosecutor failed to muster on the first trial. The Prosecutor had that chance at the September 12, 1978 hearing and rejected it.

The Court of Appeals without reversing the finding of insufficient evidence has ordered a new trial saying "there is no reason to restrict the Government's case on a new trial" (p. 24a).

Thus the Court of Appeals has ordered a new trial knowing or having no reason to doubt that it will end in an acquittal, unless *Burks* v. *United States* is ignored, and the purpose of the new trial is to give the Prosecutor another chance to supply evidence that it failed to muster when requested to do so at the September 12, 1978 hearing.

## The Dismissal Was an Acquittal

A determination of insufficient evidence requires taking the case from the jury and ordering an acquittal.

Here the District Court properly determined insufficient evidence before swearing in a jury because all the evidence to which the Prosecutor had limited himself had been taken before a jury, since discharged, under oath in the presence of the Court and all parties. A jury has no function unless and until the Court finds sufficient evidence to submit the case to the jury. There was no legal requirements to swear in a jury and take the testimony again for several weeks to reach the same result.

The dismissal was an acquittal, *United States* v. *Jenkins,* 420 US 358 (1975), which bars further prosecution. It cannot be reviewed, even if "based upon an egregiously erroneous foundation." *Fong Foo* v. *US,* 369 US 141; *United States* v. *Martin Linen & Supply Co.,* 430 US 564.

## Collateral Estoppel

Every count of the indictment included all the allegations of the General Conspiracy and the various counts included twelve loans by twelve borrowers.

The Court of Appeals examined and referred to the evidence relating to the different loans and the different borrowers and said the evidence with respect to the various loans and borrowers was sufficient to support the violations of Sec. 371 and Sec. 656 (576 Fed 2d 1937).

That may be true with respect to Fredenburgh and Gallagher but not with respect to McCarthy for he was acquitted on eleven of the twelve counts of violating Sec. 656. He was convicted only on one count of conspiracy under Sec. 371 and one count of violating Sec. 656 which concerned a loan to Deborah Dominach. Since every count contained all the allegations of the conspiracy, McCarthy was not only acquitted of all criminal liability with respect to all the loans except Dominach, but he was also acquitted of all criminal liability of conspiracy with respect to all the loans except Dominach. Under the Doctrine of Collateral Estoppel which is an element of Double Jeopardy none of the evidence relating to any of the loans or borrowers except Dominach can be admissible against McCarthy to prove violation of Sec. 371, and Sec. 656. *Ashe* v. *Swenson,* 397 US 436 (1970); *United States* v. *Kramer,* 289 F2d 909 (2d Cir. 1961). See opinion of Judge Kaufman, *United States* v. *Patrice,* Court of Appeals (2d Cir.), decided April 10, 1979.

The entire evidence relating to the Dominach loan is set forth in the opinion of the Court of Appeals, 576 F2d 1037. It shows that McCarthy sent her to see a Mrs. Brockman at the bank, to take a loan for Gallagher because Fredenburgh was on vacation. Neither McCarthy nor Dominach ever met with, saw or talked with Fredenburgh with respect to her loan.



There is therefore not an iota of admissible evidence to prove conspiracy between McCarthy and Fredenburgh, and the Court of Appeals stated that McCarthy received none of the money. 576 F2d 1034.

The defense of insufficient evidence was legally correct and McCarthy is entitled to an acquittal on all counts of the indictment.

## The Government Has Forfeited a Right to a New Trial

This Court has held that Double Jeopardy is not a defense to a new trial after reversal of a conviction if the reversal was for an error in the charge. *Burks* v. *United States,* 437 U.S. 1 (1978).

This is a result of weighing the Constitutional Rights of the Defendant to be free from Double Jeopardy against society's need to punish criminals and the probability of a conviction on the second trial. The general rule is made knowing that the probability of conviction on a second trial in some cases may be very slight. Since this valuable Constitutional right is taken away with such variable probabilities of re-conviction, it should be restored when it appears that it was improvidently taken away, or the subsequent conduct of the Prosecutor makes it unfair or inequitable to continue or maintain a second trial or if it becomes apparent that a re-conviction is unlikely. *Downam* v. *United States,* 372 US 734.

The finding of insufficient evidence shows no likelihood of a conviction and the District Court gave the Prosecutor a second chance to supply sufficient evidence which he rejected.

The Court of Appeals said (p. 20a):

> "It was only after the District Court filed its December 7, 1978 Order dismissing the indictment that

the Government chose to abstract the trial record and furnish the District Judge with the culled extracts of testimony which he had unsuccessfully sought months earlier. That evidence, if originally made available to the District Court might conceivably have affected the District Court's order and might have avoided an unnecessary appeal.

"We cannot condone the actions of any litigant, and particularly Government, in refusing to assist the Court when it seeks help in analyzing a problem."

In *Burks* v. *United States,* this Court said the most reasonable justification for allowing a retrial is:

"It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to cause reversible error in the proceedings leading to conviction."

If the District Court had known that the particular charge was required and had so charged the jury, the finding of no sufficient evidence to support that charge would have required an acquittal.

Therefore the judicial error did not prejudice the Government by preventing a conviction.

It prejudiced the defendants by preventing an acquittal.

Compare *United States* v. *Milton C. Jorn,* 400 U.S. 470 (1971).

How much should a criminal be punished? The petitioner and his family have suffered three years of anxiety, insecurity and enormous expenses by reason of the indictment, five weeks trial and two appeals and now must prepare for another trial and submit to months or even years of more anxiety, insecurity and expense. He was acquitted on thirteen of fifteen counts in the indictment and there is reasonable doubt of his guilt or reconviction on the other



two. A debt of more then Fifteen Thousand Dollars for legal fees has the deterred effect of a fine of a similar amount.

The Double Jeopardy clause should prohibit further prosecution and bar an Appeal from the order dismissing the indictment, under 18 USC 3731.

## CONCLUSION

**For the foregoing reasons it is urged that this petition be granted and a Writ of Certiorari be issued to review the judgment of the Court of Appeals.**

Respectfully submitted,

Carl E. Ring
*Attorney for Petitioner John McCarthy*
1701 Palisade Avenue
Union City, N.J. 07087
(202) 865-7222

# APPENDIX

## Order of Dismissal.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Cr 76-144

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UNITED STATES OF AMERICA

vs.

ANTHONY GALLAGHER, JOHN J. MCCARTHY and ALLISON FREDENBURGH

---

ORDER OF DISMISSAL.

For the reasons stated in the Memorandum of even date,

It is on this 7th day of December, 1978 ORDERED that:

1. The indictment herein, except for Counts 41 and 43, as to which the conviction of defendant Fredenburgh was affirmed and on which he has been resentenced, be and the same hereby is dismissed;

2. The dismissal is without prejudice to such course or courses of action may be open to the United States.

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk
xc: All parties

**Memorandum.**

UNITED STATES DISTRICT COURT

Room 411, U. S. Post Office Building

Newark, New Jersey 07102

MEMORANDUM.

United States v. Gallagher, et als.

Cr. 76-144

In this case, the trial jury returned verdicts of guilty against the three defendants as follows:

| | |
|---|---|
| *Gallagher:* | one count of conspiracy (§ 371);<br>twelve counts of misapplication (§ 656);<br>two counts of false statement (§ 1014). |
| *Fredenburgh:* | one count of conspiracy (§ 371);<br>thirteen counts of misapplication (§ 656)<br>two counts of false sttaement (§ 1014). |
| *McCarthy:* | one count of conspiracy (§ 371);<br>one count of misapplication (§ 656). |

Sentences were imposed. Appeals were taken. In an opinion dated May 5, 1978, the Court of Appeals vacated all the convictions except the two Fredenburgh convictions of § 1014, as to which sentence only was vactaed.

Fredenburgh was resentenced on the two § 1014 counts, and that sentence is now on appeal.

After remand, a number of motions to dismiss were filed. Dates were set for motions of this kind, or of any other kind, for all defendants, but counsel did not adhere to the schedule. On one occasion, only the attorney for Gallagher attended. On another, only the attorney for Fredenburgh attended. On all occasions, the United States attended.



At the hearing of September 12, 1978, the court outlined a number of areas, dealing with both the facts and the law, in respect to which it sought briefs from all parties. The analysis and questions raised were grounded on the court's recollection of the testimony and a review of its extensive bench notes, on matters of fact; and on the opinion of the Court of Appeals, and other decisions as to matters of law.

Of particular importance were questions whether there had been any testimony of particular kinds because, if there were not, there seemed to be serious questions whether the case could go to a jury on retrial. Since the first trial was an extended one, and since there is no reason to believe that the second will be shorter (in fact, a retrial would probably be longer since every witness who testified a second time would likely be confronted with differences of phrasing in answers given at the first trial), it seemed important to have each party check the trial record for this purpose, so that if there *were* testimony of the kinds specified, they could be pointed out by page and line.

Unfortunately, the court's specifications, as spelled out in the transcript of September 12, 1978 were virtually ignored. No party filed a brief saying that the trial record had been reviewed and no testimony found on subject X Y or Z, or that specific testimony had in fact been adduced. This ought not to have been a difficult task since each party, of necessity, had to have already made an analysis of the trial record for the purposes of the appeals.

As a result, the court has been obliged to undertake a review of the trial record itself, and from that review it concludes that the indictment cannot stand (except for the

two convictions of Fradenburgh which were not vacated, and for which he has been resentenced). Since the statute of limitations has probably expired, the matter can only be processed further if a Grand Jury returns a new indictment, free of the defects of the present one, within the time allowed by 18 USC § 3288 or other applicable law, or unless the dismissal of the indictment be reversed on appeal by the United States under 18 USC § 3731, or other applicable law.

The reasons for the present ruling follow.

*Nature of the Activity*

Fredenburgh was the branch manager of the 45th St. branch of the Trust Company of New Jersey (bank).

Gallagher was the president of a warehousing company in Bayonne, N.J., Bar-Mar Warehouse, Inc. (Bar-Mar).

McCarthy was vice-president of Bar-Mar.

As summarized by the opinion of the Court of Appeals, with considerable understanding,

> "The Government contends and the evidence shows that in 1973, Gallagher, McCarthy and Josephine Johnson, an unindicted co-conspirator and Gallagher's mistress, and at one time an employee of Bar-Mar, collaborated with Fredenburgh to generate needed funds for Bar-Mar and/or for Gallagher which Gallagher was unable to obtain because of his and Bar-Mar's poor credit rating. *To obtain money, Gallagher secured loans from the Bank in the names of third persons who were either asked by the conspirators to serve as nominal or sham borrowers and agreed to do so, or in whose names loans were granted without their express approval or knowledge.*" (Emphasis added) Slip opinion, p. 4).



While the summary could be phrased in a variety of ways from a semantic standpoint, the summary by the Court of Appeals accurately reflects that which the indictment charged, and also what the evidence showed (obviously so found by the jury). In the sense of that summary, the evidence was indeed "overwhelming".

On the court's review of the evidence, the record is barren of any evidence that the bank officer himself solicited any third person to serve as a nominal or sham borrower; or that he did or said anything to indicate an awareness on his part that any sham borrower was unable to repay the loan, or that he himself assured any sham borrower (even if financially able to repay the loan) that the bank would not look to him, but to Gallagher, for repayment.

Rather, the evidence was (in its best light) that Fredenburgh probably told Gallagher that as a branch manager he could not approve a commercial loan at all (which loans to Gallagher for the busines were), but that if Gallagher could have others apply for personal loans or like loans, which Fredenburgh had authority to approve regardless of the evaluations of the credit department at the main office, the loan that Gallagher wanted could be funneled through "nominal or sham borrowers", who had no intention of borrowing themselves for any purpose, so that the money could get to Gallagher.

*The law on "Misapplication".*

The indictment tracked with complete identity the evidence at trial. Every single substantive count of "missapplication" under § 656 charged that Fredenburgh (the bank officer) caused to be "disbursed proceeds of a loan in the amount of" $X, "in the name of" A, "which monies and funds the defendants well knew were not for the benefit

of" A "but were for the benefit of Anthony Gallagher, John McCarthy and Allison Fredenburgh, and others".

Not a single substantive count charges that Fredenburgh knew that the "nominal or shaw" borrower was unable to repay the loan, or that he assured any such borrower (regardless of financial ability) that only Gallagher (or Bar-Mar), rather than the nominal or sham borrower, would be looked to by the bank for payment of the loan.

As this court read the law, including Gens, the state of facts charged and overwhelmingly proven by evidence (believed by the jury) amounted to a "misapplication of bank funds" denounced by § 656, even though there was no evidence at all that the bank officer himself, i.e., Fredenburg, had any knowledge of the financial ability of the ' nominal or sham" borrower to repay the loan, or that he himself ever told or assured any of them that he or she would not be looked to by the bank, and that the bank would look only to Gallagher or Bar-Mar.

Misapplication of bank funds by a bank officer is but one form of fraud, of which there are endless varieties of means and methods. As this court understood the law of fraud and of misapplication of bank funds (with the *mens rea* accompanying it), no court, including the Supreme Court of the United States, has ever attempted to make a complete and comprehensive list of all the ways in which a fraud may be perpetrated, or in which bank funds may be wilfully and knowingly misapplied.

In general, courts have invariably declined to declare a closed class listing all the means and methods of fraud, of which bank fund misapplications are a segment, for the simple reason that there are no limits to the ingenuity of schemers. To announce a specific list, and to say that these are all the ways, is to invite the clever to devise still another way that falls outside the definition.



To the extent that *Gens* was considered as a guide (it was a CA-1 case and so not binding here), this court regarded the framework of facts, and the specifications of the § 656 charges, as coming squarely within the "third category" of the types listed by the *Gens* court. That category includes two definitions expressed by the *Gens* court as:

> "Third, [A] cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds, [B] *in other words, where the debtor allowed only his name to be used, enabling the bank officials to grant a de facto loan to a third party to whom the bank was unwilling to grant a formal loan.*" (emphasis added) 493 F.2d at 222.

As the *Gens* court observed, all three categories include cases in which

> "the loans *formally* being made could be characterized as 'sham' or 'dummy' loans because there was little likelihood or expectation that the named debtor would repay. *The knowing participation of bank officials* in such loans could consequently be found to have 'a natural tendency' to injure or defraud their banks and thus constitute a wilful misapplication within the meaning of § 656 . . ." (emphasis added). 493 F.2d at 222.

*The Opinion on Appeal*

The CA-3 opinion refers to the evidence as overwhelming, or clear, which it was in the context of the specifics charged by the indictment, and the methodology of the scheme devised and executed.

*Memorandum.*

However, the Court of Appeals read *Gens* differently than this court read it. It ruled the instructions were erroneous because, although the instructions were keyed to the "single loan in two loan form", with Gallagher as the "real borrower" for the "real purpose" of his business rather than a personal use for the named debtor, and although the court was careful to use "may find", rather than "shall find" (as in *Gens*), it failed to say that the jury could not find a § 656 violation unless it found that the bank manager *"knew that those named as debtors lacked the ability or intent to repay the loans."* (slip opinion p. 32) (emphasis added).

Requests from both sides to include that instruction were denied because there was no evidence of that nature in the case. The evidence was that the recruiting of borrowers was left entirely to Gallagher and his cohorts with instructions to send them in to see Fredenburgh. The evidence was that Fredenburgh actually knew nothing of the ability of the named borrowers to repay, and that the subject of not being looked to for repayment was never discussed with Fredenburgh.

Thus, the Court of Appeals read *Gens* more narrowly than this court did, and this court is bound by the reading of the Court of Appeals rather than its own.

*Conclusion*

As analyzed in some detail in the transcript of September 12, 1978, not only is there no likelihood that the evidence at a new trial would be any different, but also the particulars of each § 656 charge are precisely the same as described by the instruction found to be deficient.

Consequently, at a retrial the court would be unable to give the requested additional instruction because the § 656



*Memorandum.*

counts do not charge that which the additional instructions would address.

Under these circumstances, it follows that the indictment itself is deficient and must be dismissed.

The enumeration of the severed counts which must also be dismissed, and the reasons therefor, are fully detailed in the transcript of September 12, 1978 and are incorporated by reference here.

All that remains, then, are the two counts on which Fredenburgh's conviction was affirmed and on which he has been resentenced.

December 7, 1978

s/ VINCENT P. BIUNNO, U.S.D.J.

Original to Clerk
xc: All parties

**Memorandum.**

UNITED STATES DISTRICT COURT

Room 411, U. S. Post Office Building

Newark, New Jersey 07102

VINCENT P. BIUNNO
Judge

FOR YOUR INFORMATION

MEMORANDUM

Re: United States v. Gallagher, et als.,
Cr. 76-144

The United States has filed a motion under Rule 45(b) for an order enlarging the usual 14 day period within which to serve and file a motion for reargument or reconsideration of the order of December 7, 1978 which dismissed so-much of the indictment herein as remained open for trial.

Defendants protest that since the United States has already filed notice of appeal, this trial court lacks jurisdiction to enter any order either to extend the time or to act on any motion for reconsideration.

The major basis for the request for extension is that the workload of the U.S. Attorney's office was such as to preclude presentation of the motion to reconsider within the usual 14 day period. Assuming that were so, it is doubted that the workload was such as to prevent application, within that time, of the request for an extension of time. And if this member of the court was not available for that purpose on December 21, 1978, there were other members of the court available for the purpose.

Despite these adverse considerations, and despite the claim of lack of jurisdiction to act, it may be of assistance



to the Court of Appeals to address directly the merits of the application to reconsider.

That application is supported by a memorandum for the United States with an analysis of the evidence at the trial. So that the record may be complete, a copy of it is attached hereto, and made part of the file.

The memo analysis is what the court had called upon all parties to provide before it ruled on the dismissal. More than ample time was afforded for that purpose, but no factual analysis of this kind was provided before the ruling, and is now provided for the first time.

As was observed in the ruling on the dismissal, and in the transcript incorporated in it, it is settled law that only Fredenburgh, the bank's branch office manager, could violate 18 USC § 656 directly. Only assuming a violation by him can other parties who are not bank officers or employees be held responsible as principals either because they were co-conspirators or aiders and abetters.

Thus, the question turned on whether the indictment effectively charges Fredenburgh with violations of § 656.

Although the first part of the conspiracy count charges the language of the statute, and although that material is repeated in the first paragraph of each substantive charge of violating § 656, the fact is that each of those substantive charges is narrowed down and particularized by the assertion that the misapplication consisted of disbursing to Gallagher or others monies ostensibly loaned to the named borrowers.

As this court read the indictment, and the law at trial, this particularization was adequate to sustain the charge. Throughout the trial, the theme of the defense was that § 656 was not violated by a series of two-step loans; one group to the named borrowers, and another group from

them to Gallagher (or Bar-Mar). The evidence, as the court interpreted it, as well as the particularization of the indictment, did not support the two-loan theory. If anything, it supported the theory, overwhelmingly proved, that the loans were really and in fact to Gallagher, with the use of nominal borrowers merely a sham by which Fredenburgh could pretend to exercise his authority to approve consumer loans when in fact he was making a series of commercial loans for which he had no authority at all.

As this court viewed the matter at trial, the fact that Fredenburgh saw to it that the funds reached Gallagher (shown directly in some cases and by inference in others) was itself strong evidence of misapplication. On a loan to A, it would seem obvious that the bank officer would see to it that the proceeds (along with the installment payment book) would reach the borrower A, and that for the bank officer to see to it that the loan proceeds reached Gallagher—especially since none of the checks was endorsed to Gallagher's order—was a clear case of misapplication of bank funds by him under the statute.

The Court of Appeals saw the law differently, and this court is bound by its ruling. While the ruling focused on the instructions to the jury, and the aspects drawn from the *Gens* case that the opinion discusses, the fact is that the instructions tracked the particularization of the charges which indeed ma'ched the evidence.

The testimonial analysis now submitted by the United States confirms this view. It shows an extremedly strong factual case, both by direct evidence and inference, of precisely what the substantive counts charged, namely, that the loans to the nominal borrowers were sham or dummy loans, and that what Fredenburgh was really doing was lending bank funds to Gallagher.



The scheme shown was that Gallagher needed cash and could not borrow on his own. It showed that he and Fredenburgh were friendly. It showed, by inference, that Fredenburgh supplied Gallagher with blank forms for personal loans. It showed that Gallagher and his cohorts (not Fredenburgh) induced a group of friends, associates or employees to sign these applications, some in blank, others filled out, and some filled out at the bank. A number were filled out in the names of persons not even aware their names were bing used.

For all the loans, the evidence showed that Fredenburgh approved the applications and initialled the checks for cashing. For some of the loans, the named borrowers never received a check or endorsed a check and did not receive the funds, yet the funds reached Gallagher. In one case, Fredenburgh saw to the cashing of the check and instructed the nominal borrower to take the money "to the warehouse".

Fredenburgh approved loans despite rejection by the credit office; he said he knew the borrowers but when confronted with the list could only identify one name.

There was considerably more corroborating evidence, clearly accepted by the jury. Taken all together it showed an arrangement by which Fredenburgh instructed Gallagher on the means and methods by which Gallagher could get the money with Fredenburgh's assistance. But, so far as the evidence went, all of the discussions with borrowers were by Gallagher and his cohorts. There was no evidence of any knowledge by Fredenburgh that a given borrower could not repay, or did not intend to repay. There was no evidence that Fredenburgh ever assured any borrower that the bank would look only to Gallagher for repayment.

*Memorandum.*

Fredenburgh evidently left all of this to Gallagher, and himself took great care to avoid saying anything incriminating to those borrowers he saw. He was careful to "play-act" as though he were really passing on consumer loans to the named borrowers.

It was this sophisticated aspect of the factual history that supported the particularization of each § 656 charge and the instructions to the jury.

The submission now made in no way changes the previous analysis. The interpretation laid down by the Court of Appeals is not only the law of the case but also the law for this Circuit. As this court continues to see that law, the particularized charges of § 656 violations fail to charge an offense. If this implies that ingenious bank officers can, by this or other methods not thought of by the *Gens* court or by the Court of Appeals for this Circuit, circumvent the provisions of § 656 and avoid conviction, the remedy lies elsewhere.

On the other hand, if the United States believes it can establish facts to bring home to Fredenburgh knowledge that a nominal borrower could not pay, or did not intend to pay, or that he assured a borrower that the bank would look only to Gallagher for repayment, it is presumably free to seek a superceding indictment and have a trial thereon. It may be, from the extensive evidence at trial, that it is unable to produce such evidence; but unless it can, and unless a Grand Jury votes a superceding indictment, there is no point to the retrial of a long case that appears likely to end in a judgment of acquittal at the end of the case in chief.

January 30, 1979

s/ VINCENT P. BIUNNO, U.S.D.J.

Original to Clerk
xc: All counsel



*Memorandum.*

NOTE: In the event of a retrial, either because of a reversal of the order of dismissal or under a superceding indictment, the court may be obliged to allow evidence, for each nominal borrower claimed to be unable to repay, in respect to the assets and liabilities of each as well as of current or expected revenues and expenses at the time (e.g., a balance sheet and profit and loss statement). This would apply to such borrowers as Esposito, Squillante, Ryan, Palmisano, Killner, Daly, Brennan, Slivocka, Dominach, and possibly others. If this be an issue, which it was not under the original instructions, defendants are obviously entitled to examine into it.

**Judgment.**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2678

UNITED STATES OF AMERICA,

Appellant,

vs.

GALLAGHER, ANTHONY
McCARTHY, JOHN
FREDENBURGH, ALLISON

(D. C. Crim. No. 76-00144-01-02-03)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: WEIS and GARTH, *Circuit Judges* and BECHTLE, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 6, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 8, 1978, which order dismissed the indictment, be, and the same is hereby vacated and a new trial ordered, in accordance with the opinion of this Court.

Attest:

Clerk

July 23, 1979

* Honorable Louis C. Bechtle, United States District Court for the Eastern District of Pennsylvania, sitting by designation.



**Opinion of the Court.**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2678

UNITED STATES OF AMERICA,

Appellant,

v.

ANTHONY GALLAGHER, JOHN McCARTHY,
and ALLISON FREDENBURGH,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. No. 76-00144-03)

Argued June 6, 1979

Before WEIS and GARTH, *Circuit Judges*,
and BECHTLE, *District Judge.**

Opinion filed JUL 23 1979

OPINION OF THE COURT

* Honorable Louis C. Bechtle, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

WEIS, *Circuit Judge.*

This is the second appeal stemming from convictions on charges of misapplication of bank funds. In the first appeal, we found sufficient evidence to convict but remanded because of error in the jury instructions. The district court read our opinion as setting a new legal standard for the offense, concluded that the proofs submitted at the first trial would be inadequate under this standard, and dismissed the indictment. Regarding the district court's rationale and remedy as repugnant to our original review, we reverse and remand for retrial.

A jury found codefendants Anthony Gallagher and Allison Fredenburgh guilty of numerous counts of misapplication of bank funds, 18 U.S.C. § 656, making false statements in connection with bank loans, 18 U.S.C. § 1014, and one charge of conspiracy, 18 U.S.C. § 371. Another codefendant, John J. McCarthy, was convicted on one misapplication count and the conspiracy charge. On appeal, this court found that there was insufficient evidence to support the conviction of Gallagher on the § 1014 counts but enough to sustain the guilty verdicts against Fredenburgh. We determined also that because of an error in the jury instructions, all of the convictions on the § 656 counts and the conspiracy charge had to be vacated. The case was, therefore, remanded to the district court. *United States* v. *Gallagher,* 576 F.2d 1028 (3d Cir. 1978).

On remand, rather than proceed with a new trial, the district court granted defendants' motion to dismiss the indictment except as to the two § 1014 counts against Fredenburgh, which we had affirmed. The government appeals from the dismissal of the indictment.[1]

Since the facts are set out in considerable detail in our

[1] The government's appeal from the order dismissing the indictment is permissible under 18 U.S.C. § 3731. Serfass v. United States, 420 U.S. 377 (1975).



first opinion, we will only briefly refer to them here. Gallagher and McCarthy needed money to finance the operation of their business but were unable to qualify for bank loans. To resolve their difficulty, they worked out a scheme to have defendant Fredenburgh, a branch manager of Commercial Trust Company of New Jersey, grant loans to various individuals whose names were furnished by the codefendants. Gallagher then received the proceeds of the loans and Fredenburgh, in turn, received a percentage as a kickback. In some instances, loans were made in the names of persons who had not even applied for them.

On the § 656 counts,[2] the jury was instructed that if the bank officer advanced the money as a personal, consumer, or home improvement loan knowing that the real borrower was someone else and the actual purpose was a business use, there was a willful misapplication of bank funds. Quoting extensively from *United States* v. *Gens,* 493 F.2d 216 (1st Cir. 1974), we held the charge was erroneous because it failed to instruct the jury that it must find that the bank officer knew the named debtors "lacked the ability or intent to repay the loans." 576 F.2d at 1046 (footnote omitted). For this reason the court reversed the convictions on the § 656 counts, and because the conspiracy convictions may have been implicated by the error affecting the § 656 charges, those, too, were vacated. In response to the assertions that there had been insufficient evidence to convict on the § 656 counts, however, we said: "[W]ithout employing inference or inferences, the jury could reason-

[2] The statute provides in pertinent part:
"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, . . . willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

ably find as it did that there was a clear intention and effectuation of purpose by the appellants to violate §§ 656 and 371." *Id.* at 1037 (footnotes omitted).

On remand, the district court invited comments from counsel as to whether there had been any evidence at the first trial that Fredenburgh had the requisite *Gens* criminal knowledge, and whether in light of the court of appeals's opinion the indictment properly set out violations of § 656. The government declined the invitation to discuss the evidence, choosing to rely instead on the law of the case doctrine, but the defendants did comply with the court's request. After a hearing, the court granted the defendants' motions to dismiss the indictment because it failed to state that Fredenburgh either knew the nominal borrowers were unable to repay the loan or assured the borrowers that the bank would look to Gallagher for repayment.[3]

[3] The government refused to review the trial record as the court had asked it to do, stating in its memorandum that:

> "To reanalyze evidence and theory which have been thoroughly examined and thereafter ruled upon by the court of appeals would be 'intermeddling' with the final decision of that court and, for that reason, the United States respectfully declines to cull from the transcript the evidence this court [the district court] has requested for its redetermination of the evidential sufficiency."

It was only after the district court filed its December 7, 1978 order dismissing the indictment that the government chose to abstract the trial record and furnish the district judge with the culled extracts of testimony which he had unsuccessfully sought months earlier. That evidence, if originally made available to the district court, might conceivably have affected the district court's order and might have avoided an unnecessary appeal.

We cannot condone the actions of any litigant, and particularly the government, in refusing to assist the court when it seeks help in analyzing a problem. Whether the government disagreed with

*(footnote continued on following page)*



In its memorandum accompanying the dismissal order, the district court discussed the evidence in the first trial bearing on the banker's knowledge. We are, therefore, in some doubt as to whether the court acted only on the legal question of the indictment's language or whether it in effect was ruling that the anticipated evidence on retrial would be insufficient for conviction, either, under the terms of the original indictment of what the district court believed to be a redefined indictment.

We first consider the semantical question of whether the indictment states an offense under § 656. In *United States* v. *Gens, supra,* the court held that there is a misapplication under the statute when bank officials knew the named debtor was wholly unaware that his name was being used. Similarly, when bank officials assured the named debtor that they would look only to the third party for repayment despite the fact that the bank was unwilling to extend the loan directly to that party, a misapplication is established. As *Gallagher I* phrased it, if the bank official knows that the named "debtor lacked the ability or intent to repay the loans" and the proceeds go to a third party, the offense has been made out.

Fairly summarized, the district court's position is that our opinion in *Gallagher I* articulated a narrower definition of 656 offenses than that which had been used throughout the first trial, and the indictment failed to set out the elements of the redefined crime. We do not find such a deficiency in the indictment since it was written in the

*(footnote continued from preceding page)*

the district court's approach is not the issue. By arguing in the alternative, the government could have supplied the district court with the evidential extracts it desired, and pressed its "law of the case" argument as well.

To deny requested assistance to any court is to deny the tenets of trial advocacy demanded of our profession and to depart from the high standards we expect of government counsel.

terms of the statute. Paragraphs 1 through 11 of count I, the conspiracy charge, set out the general pattern of defendants' conduct. Included are the following allegations: the three defendants solicited third parties to apply for loans for the benefit of the defendants and the third parties were assured by the defendants that Gallagher would be responsible for repayment; loans used for the defendants' benefit were secured in the names of third persons without their knowledge; and the defendants caused false statements and forged signatures to be made on the various loan applications. After incorporating these general allegations, count II, representative of the other six § 656 charged, states that the defendants "did knowingly and wilfully misapply" bank funds, "with intent to injure and defraud the said bank." This language, considered collectively, clearly charges an offense under § 656, and the indictment is not facially deficient.

It appears, however, that the district court went beyond the text of the charges and analyzed the evidence received at the first trial to determine if it was consistent with the terms of the indictment. We find authority for such a procedure. To the contrary, in *United States* v. *Knox,* 396 U.S. 77 (1969), the Court observed that Fed. R. Crim. P. 12(b)(1) cautions the trial judge to consider on a motion to dismiss the indictment only those objections that are "capable of determination without the trial of the general issue," and that evidentiary questions should not be determined at that stage. As was held in *United States* v. *King,* 581 F.2d 800, 802 (10th Cir. 1978), the sufficiency of an indictment "may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence." *See generally* 8 MOORE'S FEDERAL PRACTICE ¶ 12.04 (2d ed. 1978).

The defendants concede this basic principle but argue that a different rule applies on a retrial. We do not accept that conclusion. Implicit in it is the premise that the trial court may consider the evidence introduced at the first trial because the prosecution will be limited to precisely that same evidence on the retrial. In support of their position, the defendants rely upon *Burks* v. *United States,* 437 U.S. 1 (1978). There, the Supreme Court held that if upon appellate review it is determined that there was insufficient evidence to convict, then the defendant must be acquitted. During the course of its opinion, the Court said: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. Defendants would have us read this comment as overruling the precept expressed by the Court in *United States* v. *Shotwell Manufacturing Co.,* 355 U.S. 233 (1957):



> "[U]pon appellate reversal of a conviction, the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *Id.* at 243.

We are persuaded that the *Shotwell* rule has not been invalidated by *Burks.*

The situation in *Burks* is obviously quite different from the one presented here. *Burks* holds that the prosecution should be given only one opportunity to produce sufficient evidence to sustain a conviction. Yet, in *Gallagher I,* we remanded not because of evidentiary insufficiency but because of legal error in the charge. Only for that reason must the case be retried. The *Burks* Court does not impose a preclusive rule upon the evidence that may be used at retrial once the government has met its initial production burden. It erects a double jeopardy barrier only if the prosecution fails to produce sufficient evidence at the first trial. Thus, apart from the requirement that the new

evidence conforms to the indictment, there is no reason to restrict the government's case at a second trial. By the same token, the defense is also free to present testimony at the retrial which it had not utilized in the first encounter.

We think it pertinent, also, to point out that the sufficiency of the evidence as to all of the defendants under the § 656 counts was challenged on the first appeal. We reviewed the lengthy testimony and found it adequate to sustain the conviction. If the district court's determination to dismiss the indictment was based upon its reassessment of the sufficiency of the evidence, that action was beyond the scope of its authority. In the absence of intervening and superseding appellate decisions, the district court is not free to reevaluate matters that have been decided by the appellate tribunal in the same litigation. We conclude, therefore, that the order of the district court must be vacated so that a new trial may proceed forthwith.

The order of the district court dismising the indictment will be vacated and a new trial will be ordered.[4]

To the Clerk:

Please file the foregoing opinion.

---

[4] Defendants may be retried only on those counts for which there was sufficient evidence to convict at the first trial. *Burks* v. *United States, supra.* Accordingly, the new trial must be limited to the following counts of the redacted indictment: as to Gallagher, Count I (§ 371), Counts II through XI, Count XIII, and Count XV (§ 656); as to Fredenburgh, Count I (§ 371), Counts II through XI, and Counts XIII through XV (§ 656); as to McCarthy, Count I (§ 471), and Count VII (§ 656).



**Petition for Reconsideration.**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2678

UNITED STATES OF AMERICA,

Appellant,

v.

ANTHONY GALLAGHER, JOHN MCCARTHY, and ALLISON FREDENBURGH,

Appellees.

Present: WEIS and GARTH, *Circuit Judges,* and BECHTLE, *District Judge.**

ORDER

The petition for reconsideration filed by the appellees in the above entitled case having been submitted to the judges who participated in the decision of the court, and after consideration of said petition, it is

ORDERED that the petition for reconsideration is denied.

BY THE COURT
Illegible WEIS, J.

Circuit Judge

DATED: August 17, 1979

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* Honorable Louis C. Bechtle, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

**Order Extending Time to File Petition for Writ of Certiorari.**

SUPREME COURT OF THE UNITED STATES

No. A-124

JOHN McCARTHY,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 21, 1979.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of August, 1979.

Supreme Court, U. S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-385 and 79-438

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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JOHN MCCARTHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ANTHONY GALLAGHER, ET AL., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ELLIOTT SCHULDER
ROBERT RALSEY DAVENPORT II
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-385

JOHN McCARTHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 79-438

ANTHONY GALLAGHER, ET AL., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a)[1] is reported at 602 F. 2d 1139. The opinion of the district court (Pet. App. 13a-20a) and the decision denying a motion for reconsideration (79-385 Pet. App.

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[1]Unless otherwise indicated all "Pet. App." references are to the petition in No. 79-438.

10a-15a) are unreported. The decision of the court of appeals on the initial appeal in this case (Pet. App. 21a-55a) is reported at 576 F. 2d 1028.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on July 23, 1979. A petition for rehearing was denied on August 17, 1979 (Pet. App. 3a). The petition for a writ of certiorari in No. 79-385 was filed on September 6, 1979. The petition for a writ of certiorari in No. 79-438 was filed on September 17, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars retrial of petitioner McCarthy following the reversal of his initial convictions for trial error and the subsequent reversal of a pretrial order dismissing the indictment for failure to charge an offense (No. 79-385).

2. Whether petitioners may be convicted of a criminal conspiracy to accomplish only one of two criminal objects listed in the conspiracy count of the indictment (No. 79-438).

## STATEMENT

1. In an indictment filed in the United States District Court for the District of New Jersey, petitioners were charged with misapplication of funds of a federally insured bank, in violation of 18 U.S.C. 656, making false statements in connection with bank loan applications, in violation of 18 U.S.C. 1014, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.



The evidence at petitioners' first trial showed that petitioners Gallagher and McCarthy were unable to obtain bank loans for their business firm in 1973 because of the firm's poor financial condition. They therefore arranged to have petitioner Fredenburgh, a bank manager, approve bank loans to several individuals on the understanding that petitioner Gallagher would in fact receive the proceeds of the loans. After the loans were authorized, petitioner Fredenburgh received a percentage of the proceeds as a kickback (Pet. App. 6a, 22a-32a). The jury convicted petitioners on the conspiracy count and on various counts of misapplication of bank funds (18 U.S.C. 656).[2] Petitioners Gallagher and Fredenburgh were also convicted on two counts of making false statements in connection with bank loans (18 U.S.C. 1014).

On appeal, the court of appeals ruled that the evidence was sufficient to support the convictions for conspiracy and misapplication of bank funds (Pet. App. 33a), but the court reversed petitioners' convictions for the conspiracy and misapplication offenses because the district court failed to instruct the jury "that it must find that Fredenburgh knew that those named as debtors lacked the ability or intent to repay the loans" (*id.* at 50a; footnote omitted).[3] The case was remanded to the district court (*id.* at 55a).

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[2]Petitioner Fredenburgh was convicted on 13 counts, petitioner Gallagher on 12 counts, and petitioner McCarthy on one count of misapplication of bank funds. Petitioner McCarthy was acquitted on the remaining misapplication counts and on the false statement charges (18 U.S.C. 1014).

[3]The court affirmed petitioner Fredenburgh's convictions for making false statements (18 U.S.C. 1014) but vacated his sentences on those counts (Pet. App. 52-55a & n.17). Petitioner Fredenburgh has been resentenced on those convictions, which are not at issue in this petition (*id.* at 14a-15a).

2. On remand, the district court dismissed the indictment for failure to charge an offense (Pet. App. 13a-20a; 79-385 Pet. App. 10a-15a). The district court ruled that the conspiracy and misapplication counts of the indictment are deficient because they fail to allege that petitioner Fredenburgh was aware that the named debtors were unable or unwilling to repay the loans (Pet. App. 19a-20a). In addition, the district court expressed its belief that the evidence at the first trial was insufficient to establish Fredenburgh's knowledge of the debtor's inability or unwillingness to repay and observed that there was "no likelihood that the evidence at a new trial would be any different" (*id.* at 19a).

3. On the government's appeal, the court of appeals reversed the district court's order and remanded the case for retrial (Pet. App. 5a-11a). The court first noted that the government's appeal from the dismissal order was permissible under 18 U.S.C. 3731 (*id.* at 5a). It then concluded that the indictment, which tracks the language of the statute, sufficiently charges an offense under 18 U.S.C. 656 (*id.* at 8a-9a). Finally, the court of appeals held that, to the extent the district court's ruling was based on the alleged insufficiency of the evidence at the first trial, such a finding was both premature—because the government was free to introduce additional evidence on retrial (*id.* at 9a-10a)— and was foreclosed because the court of appeals had ruled that the evidence was sufficient on the prior appeal (*id.* at 11a).

4. We have been informed that, on remand, the district court has severed petitioner McCarthy's case from that of petitioners Gallagher and Fredenburgh. The trial of petitioners Gallagher and Fredenburgh commenced on September 18, 1979, and is currently in progress.



## ARGUMENT

1. Petitioner McCarthy asserts (79-385 Pet. 6-15) that the district court's order dismissing the indictment was in reality a judgment of acquittal since, in petitioner's view, the dismissal was predicated in part on a finding that the evidence on retrial would be insufficient to convict on the misapplication and conspiracy charges. Therefore, petitioner argues, the government's appeal and any subsequent retrial are barred by the Double Jeopardy Clause. This argument is insubstantial and was correctly rejected by the court of appeals.

To begin with, petitioner concedes (79-385 Pet. 6), as he must, that he was subject to retrial following reversal of his original convictions for error in the jury instructions. See *Burks* v. *United States*, 437 U.S. 1, 15-16 (1978); *Greene* v. *Massey*, 437 U.S. 19, 25-26 (1978). Once the convictions were reversed, the case was remanded to the district court and set for retrial. Before retrial commenced, however, the district court dismissed the indictment "because the particularized charges of §656 violations fail to charge an offense" (79-385 Pet. App. 14a). The pretrial dismissal order, entered before jeopardy had attached on retrial, was appealable by the government because retrial of petitioner following reversal of the dismissal order would not subject petitioner to an impermissible second jeopardy. See *United States* v. *Sanford*, 429 U.S. 14 (1976); *Serfass* v. *United States*, 420 U.S. 377 (1975).

Petitioner contends (79-385 Pet. 11), however, that the district court's order amounted to an "acquittal" because it was based in part on a finding that the anticipated evidence on retrial would be insufficient. But exactly the

same was true in *Serfass* (except that the trial court acted before a first trial), yet the Court recognized the constitutionality of the government's appeal.

Moreover, it is axiomatic that an acquittal may be entered only after trial has commenced and evidence has been taken. Fed. R. Crim. P. 29. It makes no sense to say that the government has failed to produce sufficient evidence to sustain a conviction before the government has had an opportunity to present any of its evidence. Nor is it relevant that petitioner previously had been tried for these offenses. Petitioner McCarthy was convicted on one misapplication count and on the conspiracy count after the first trial. Thereafter, the court of appeals upheld the sufficiency of the evidence on those counts, and, so far as the record shows, petitioner never sought review of that determination. Accordingly, retrial of petitioner on those charges is permissible. See *Burks* v. *United States*, *supra*.[4]

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[4]Petitioner McCarthy also argues (79-385 Pet. 8-11, 13-15) that the district court's ruling on the sufficiency of the evidence was correct and should be reinstated. On this issue, we rely on the opinion of the court of appeals (Pet. App. 9a-11a). Moreover, under the law of the case doctrine, the district court had no authority to reassess the sufficiency of the evidence at the first trial, because the court of appeals had already reviewed the evidence and found it sufficient to support the convictions. In any event, the government is free on retrial to introduce new evidence not presented at the first trial. See *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957). *Burks* v. *United States*, 437 U.S. 1 (1978) on which petitioner relies (79-385 Pet. 11), does not support petitioner because the evidence at the first trial was insufficient in that case to sustain the conviction.

McCarthy's claim that the doctrine of collateral estoppel applies in this case was not considered by the district court in dismissing the indictment. In a separate order, however, the district court rejected petitioner's claim, and an appeal from that ruling is now pending before the Third Circuit (No. 79-2329).



2. Petitioners Gallagher and Fredenburgh contend (79-438 Pet. 5, 7-12) that they may not be convicted of conspiracy to misapply bank funds under an indictment charging them with conspiracy to misapply bank funds *and* make false statements in connection with bank loan applications.[5]

But petitioners have not yet been convicted on such a theory (see note 5, *supra*). Petitioners' original conspiracy convictions were set aside on the first appeal for error in the instructions, not for evidentiary insufficiency, and they have not yet been convicted at their ongoing retrial. It is presently premature for this Court to pass upon petitioners' speculative claim that (a) they will be convicted of conspiracy at their retrial and (b) that the government's proof will support a finding that petitioners agreed to violate only one objective of the charged conspiracy. If petitioners are acquitted at their new trial, their claim will be moot. If they are convicted on the conspiracy count, there will be time enough for the issue to be brought to this Court for further review in a

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[5]Petitioners argue that this claim arises because, on the first appeal, the court of appeals reversed the false statement convictions against petitioner Gallagher for insufficient evidence. Petitioners acknowledge that the court upheld the false statement conviction against petitioner Fredenburgh, but they reason that Fredenburgh cannot be convicted of a conspiracy to make false statements if no one else participated in that crime (Pet. 5). A reading of the opinion makes clear, however, that this reversal of Gallagher's substantive convictions under Section 1014 was not based in any way on the conclusion that Gallagher and Fredenburgh did not conspire to violate that statute, but rather on the view that the evidence would not support a finding that Gallagher committed the false statement offenses as a principal.

concrete, justiciable form. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).[6]

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ELLIOTT SCHULDER
ROBERT RALSEY DAVENPORT II
*Attorneys*

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[6]Petitioners also argue (Pet. 2; [redacted] Pet. 12-13) that the indictment failed to state an offense under 18 U.S.C. 656. The court of appeals correctly rejected this contention, holding that the indictment, which was written in the terms of the statute, clearly charges an offense under Section 656 (Pet. App. 8a-9a). In any event, this Court should not interrupt petitioners' trial in order to undertake review of this issue. If petitioners are convicted, they may raise the issue on appeal after final judgment.

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